

**U.S. DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, NORTHWEST - SUITE 400
WASHINGTON, DC 20001-8002**

DATE: 01/29/97

CASE NO.: 95-INA-105

In the Matter of

STACY CASALUCI
Employer

on behalf of

JULIA VILLARUBIA-CASTILHO
Alien

Before: Holmes, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM

This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer (CO) of an application for alien labor certification. The certification of aliens for permanent employment in the United States is governed by section 212 (a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. 1182 (a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.). Unless otherwise noted, all regulations cited in this decision refer to Title 20.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file (AF) and any written arguments. 20 C.F.R. 656.27(c).

STATEMENT OF THE CASE

The Employer has applied for certification to permit the Alien to work as a "Child Tutor" to perform the duties of caring for children; overseeing their recreation, diet, health and deportment; and teaching them good health and manners. In her application and advertisement for the position, the Employer specified that any U.S. applicant for the position must have 2 years experience in the job offered.

The application was processed by the California Employment Development Department (EDD) and submitted to the CO for his consideration. On November 5, 1993, the CO remanded the case to the EDD with instructions to inform the Employer that her 2 year experience requirement exceeded the Specific Vocational Preparation Time (SVP) for the position as set forth in the Dictionary of Occupational Titles (D.O.T.), i.e., 6-12 months. The Employer was to be given the opportunity to justify the requirement or amend and re-recruit. Such information was relayed to the Employer by EDD on November 18, 1993.

The Employer responded to EDD on December 13, 1993. She noted that a 2 year experience requirement for a Child Tutor had been approved previously by the CO for another employer and contended that such approvals are precedents which must be followed. She maintained further that her children are young and a person with less than 2 years experience "would not be able in all probabilities to perform the duties called for in the application."

The record was then resubmitted to the CO who issued a Notice of Findings (NOF) on March 29, 1994, in which he proposed to deny certification. Included in the reasons for the proposed denial was the Employer's failure to establish business necessity for the 2 year experience requirement. She was afforded another opportunity to do so or to delete the requirement and retest the labor market.

The Employer's rebuttal to the NOF was essentially no different than her response to the EDD on the experience issue. Accordingly, the CO issued a Final Determination in which he denied certification, in part, on the basis of an unduly restrictive experience requirement. The Employer has requested administrative-judicial review of the denial of certification, and the case was forwarded to the Board for such action.

DISCUSSION

Although the CO has assigned several bases for denying the application in this case, we will focus on only one issue, i.e., whether the Employer's experience requirement is excessive.

Section 656.21(b)(2)(I)(B) of the regulations provides that an employer's job opportunity requirements must be those defined for the job title in the D.O.T, unless such requirements are established as arising out of business necessity. The Board has held that where an education and/or experience requirement exceeds the SVP time for the position as stated in the D.O.T., the requirement is unduly restrictive and business necessity for the same must be shown. *See, e.g., Bantam Collections, Inc.*, 88-INA-428 (Feb. 21, 1990).

The Employer attempts to justify her 2 year experience requirement for a Child Tutor by relying on certifications which may have been granted by the CO in the past in other cases. However, the Board has held that each labor certification application involves its own set of facts and issues and, therefore, "submission of another employer's approved application does not set any precedent to which the CO [or the Board] is bound." *Paralegal Priorities*, 94-INA-117 (Feb.

1, 1995). See also, Tedmar's Oak Factory, 89-INA-62 (Feb. 26, 1990).

The Employer's assertion that two years experience is required because of the ages of her children falls far short of establishing business necessity for the same. The DOT for Child Tutor does not specify any particular age group, and accordingly, the SVP for the position must be considered as applying to working with children of all ages.

As the Employer has failed to establish business necessity for her two years experience requirement and has declined to lower the requirement on the two occasions offered to her, certification was properly denied.

ORDER

The Certifying Officer's DENIAL of labor certification in this case is AFFIRMED.

Entered at the direction of the panel

Todd R. Smyth, Secretary to the Board
Of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon granting of a petition the Board may order

briefs.